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No. 719

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

COMMERCIAL COMMUNICATIONS, INC., ET AL.
AND
WATSON COMMUNICATIONS SYSTEMS, INC., ET AL.
*Appellants*
*vs.*
PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
AND
PACIFIC TELEPHONE AND TELEGRAPH COMPANY

*ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA*

## OPPOSITION TO MOTIONS BY THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY TO DISMISS APPEAL

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April 13, 1959.

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## OPPOSITION TO MOTIONS BY THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY TO DISMISS APPEAL

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### Preliminary Statement

The separate motions to dismiss filed by the California Public Utilities Commission and the Pacific Telephone and Telegraph Company do not overcome the federal issues of paramount public importance raised by the divided decision of the California Su-

preme Court. In essence, the majority opinion by four Justices authorized the Telephone Company to invade the private radio leasing and servicing business, while the three minority Justices feared that this would create "a tendency to promote monopoly in a field of business operation which is and should remain in the realm of free enterprise." (Juris. St., p. A19).

As detailed in appellants' Jurisdictional Statement, the majority ruling below (1) contravenes the injunction of a federal antitrust decree which, as repeatedly confirmed by the United States Department of Justice, prohibits the extension of the telephone monopoly into the competitive area of private mobile radio;[1] (2) clashes with the provisions of Title III of the Communications Act for the competitive development of radio over the public airwaves; and (3) offends against the Constitution of the United States by approving voluntary utility regulation enabling a monopoly to expand into a competitive private area to the detriment of independent business firms.

As we shall show, the strained and technical arguments mustered by the motions to dismiss cannot ob-

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[1] In addition to the previous expressions by the Justice Department to this effect, cited in Juris. St., p. 8 n. 5, the Department of Justice on February 20, 1959, again advised the Federal Communications Commission of "the purpose and intent of the Final Judgment that AT&T and its subsidiaries withdraw from the private communications field," and reiterated its position "that the decision of the Supreme Court of the State of California upholding a decision of the California Public Utilities Commission accepting a tariff voluntarily filed by the Pacific Telephone and Telegraph Company covering the installing, leasing and maintenance of communications equipment for private mobile communications systems, does not change the application of Section V of the Final Judgment prohibiting engagement in this activity with persons who were not lessees of such systems on March 11, 1956 and, in any event, after January 24, 1961." F.C.C. Dkt. No. 12708

sure the focal issue of unlawful monopoly sponsored by an agency of the state.

The substantiality of the issue is eloquently documented by the Telephone Company's sudden maneuver, first announced in its Motion (p. 13), to pull back from the California Commission its lease-maintenance "tariff" whose approval generated the broader controversy now before this Court. The ostensible reasons for this bolt cannot withstand scrutiny. The Telephone Company's asserted "uncertainty" as to the meaning of the decree (Mot., p. 13) can obviously be resolved by this Court before January 1961. Indeed, it could have been ended two years ago, after the first warnings by the Department of Justice, through a motion by the Telephone Company for a construction of the decree by the federal district court—rather than pushing the case through the regulatory commissions over the protest of injured competitors. Actually, the Telephone Company's withdrawal application to the California Public Utilities Commission on March 17, 1959 (one day after the date of the appellee Commission's Motion to Dismiss) highlights this Court's jurisdiction to resolve this clear and present controversy over issues of national significance. For the application indicates not a clear-cut and unqualified abandonment of Telephone Company activities in the private mobile radio field, but seeks a legal foundation to re-enter the private radio leasing business by economically equivalent arrangements under the ægis of regulatory agencies despite the antitrust injunction.[2]

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[2] See Application for Tariff Cancellation, pp. 12-13. Inasmuch as the Telephone Company has not seen fit to submit the text of its application for the tariff withdrawal as announced in its Motion, appellants have lodged a copy with the Clerk for the convenience of the Court.

Compare *Carpenters Union* v. *National Labor Relations Board*, 341 U.S. 707, 715 (1951); *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37, 43 (1944).

*The Telephone Company's Radio Activities Have Sufficient Interstate Aspects To Bring the Antitrust Laws and the Communications Act into Play.*

The motions of appellees, predicated heavily on asserted lack of "interstate commerce" (P.U.C. Mot., pp. 8, 13, 14, 15; Tel. Co. Mot., pp. 4, 17, 19), ignore that neither the antitrust laws nor the Communications Act exempt activities in California which radiate restrictive consequences beyond its borders.

It is axiomatic that the Sherman Act, which lends statutory force to the antitrust decree, is not rendered "inapplicable" merely because the Telephone Company's "tariff" covers private radio systems located within California. This Court has long held that the Sherman Act condemns monopolistic restraints wheresoever perpetrated—so long as their impact transcends local boundaries. *E.g., United States* v. *Employing Plasterers Ass'n of Chicago*, 347 U.S. 186, 189 (1954); *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 232 (1948). The private radio systems leased by the Telephone Company in California (and by other AT&T subsidiaries elsewhere) not only travel the inherently national domain of the radio spectrum, but involve equipment which admittedly is purchased "on the open market." (P.U.C. Mot., p. 23). Cf. *C. J. Community Services* v. *Federal Communications Commission*, 246 F. 2d 660, 663 (D.C. Cir. 1957). Most important, these private mobile radio systems may be leased only to persons expressly licensed by the Fed-

eral Communications Commission to occupy frequencies in the radio spectrum. Hence the appellee Public Utilities Commission's assertions of antitrust immunity by the asserted "intrastate" character of the Telephone Company's activities is unsupported and untenable.

In the same way, the prohibitions and policies of the Communications Act for the competitive development of radio do not stop at California's borders. The appellee Commission asserts that Section 2(b) of the Communications Act, 47 U.S.C. § 152(b), reserves to the states a plenary power over certain "intrastate" radio activities. (Mot., pp. 7-8, 13, 19). But as this Court long ago declared, "No state lines divide the radio waves, and national regulation is not only appropriate but essential to the efficient use of radio facilities." *Federal Radio Commission* v. *Nelson Bros. B. & M. Co.*, 289 U.S. 266, 279 (1933). And this Court has consistently recognized the pervasive national policies incorporated by Congress in the Communications Act of 1934 for the preservation of the public interest in the radio spectrum. *E.g., National Broadcasting Co.* v. *United States,* 319 U.S. 190, 213-214, 217 (1943). Indeed, Congress in Section 3(e) of the Act, 47 U.S.C. § 153(e), guarded against a myopic view of the concept of "interstate communication" by omitting the provisions of Title III from the scope of regulatory delegation to the states, and by furthermore ensuring that the definition of "interstate communication" must abide by the statutory "context." Besides the basic theme of competition for radio in Title III, Congress in Section 313 pointedly specified that the federal antitrust laws were to apply to interstate radio communications as well as to "trade in radio apparatus and devices entering into or *affecting*" interstate commerce. 47 U.S.C. § 313.

The position of appellees points up the public importance of the issues at bar. In their view, the federal authority is apparently limited to the parcelling out of the public radio spectrum by the Federal Communications Commission—but without the paramount federal policy of competition to foster the development of the radio art and to protect the public from monopolistic exploitation.

If the jurisdictional and definitional provisions of the Communications Act are to be construed to oust the overall policies in Title III of that Congressional enactment from the field of private mobile radio, as appellees maintain, only this Court should render such a far-reaching pronouncement.

*The Conflict of the California Rulings With the Injunction of the Federal Antitrust Decree is Unresolved.*

The clash with federal law posed by the Public Utilities Commission's authorization of a business activity enjoined by a federal antitrust decree cannot be minimized. Admittedly the Telephone Company filed its so-called tariff "[w]ithin a few weeks after the consent decree" (P.U.C. Mot., p. 3)—despite its prohibition on the lease-maintenance of private radio systems as repeatedly confirmed by the Department of Justice. While the Telephone Company vigorously maintains that the "Department misconstrues the consent decree" (Mot., p. 13), these protestations are out of tune with the Telephone Company's distaste for a judicial resolution of the crucial issue—*i.e.*, whether voluntary submission to agency regulation permits the Telephone Company to break out of its legal containment to invade businesses

which are not genuine "common carrier" services and do not constitute "natural monopoly."

Nor is this Court now powerless, as the Telephone Company suggests, to resolve with finality this controversy over a historic antitrust decree. Antitrust issues arise not only in prosecutions by the Department of Justice in the federal district courts, but can come into play in the context of state court litigation which culminates in Supreme Court review of substantial federal questions decided by the state judiciary. *E.g., Straus* v. *American Publishers' Ass'n*, 231 U.S. 222, 233 (1913). And antitrust consent decrees are no less amenable to this Court's appellate jurisdiction than other consent decrees entered by federal courts whose provisions are construed in a state court controversy. See *Donohue* v. *Vosper*, 243 U.S. 59, 63-64 (1917). Indeed, unless it were held that state tribunals lack all jurisdiction over antitrust issues, ultimate appellate review by this Court of state antitrust adjudications is bound to follow.[3]

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[3] The Telephone Company's suggestion that the court entering the decree retains *exclusive* jurisdiction over its application is baseless. See, *e.g.*, *American Securit Co.* v. *Hamilton Glass Co.*, 254 F. 2d 889, 895 (7th Cir. 1958); *United States* v. *Libbey-Owens-Ford Glass Co.*, 1958 CCH Trade Cases, par. 69,147 (N.D. Ohio 1958); *American Securit Co.* v. *Shatterproof Glass Corp.*, 166 F. Supp. 813 (D. Del. 1958); cf. *Switzer Bros., Inc.* v. *Byrne*, 242 F. 2d 909 (6th Cir. 1957). Also, the Federal Communications Commission recently construed the AT&T decree adversely to the Telephone Company in *Connecticut Water Co.*, 25 F. C. C. 1367 (1958). The express jurisdictional reservation in Section XVII of the decree, which appellee apparently deems important (Mot., pp. 11, 21), is a mere restatement of chancery powers in the decree court. See, *e.g.*, *United States* v. *Swift & Co.*, 286 U.S. 106, 114 (1932).

The Telephone Company's point, if valid, would dictate an automatic nullification of the decree rulings below for want of jurisdiction by the state tribunals.

The other antitrust disclaimers by appellees are untenable or largely answer themselves: (1) The so-called tariff approved by the PUC on its face and as described by the PUC opinion itself (Tariff No. 108-T, Orig. Sheets 10, 12-13; 55 Cal. P.U.C. 387, 389-90; reprinted at Tel. Co. Mot., App. pp. 4-5) reflects tying arrangements whereby the Telephone Company will lease the radio station equipment, together with all repair and replacement parts—precisely the type of arrangement which has been consistently condemned by the courts as a device for the unlawful extension of monopolies and exclusion of competitors.[4]

(2) Surely the Telephone Company can gain no comfort from this Court's recent decision in the *RCA* case. *United States* v. *Radio Corp. of America*, 27 U.S. L. Week 4179 (Feb. 24, 1959). That decision, which held that the FCC could not insulate a trans-

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[4] In addition to *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1 (1958), see, *e.g.*, *United States* v. *United Shoe Machinery Co.*, 110 F. Supp. 295, 352 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954); *Stanley Co. of America* v. *American Tel. & Tel. Co.*, 4 F. Supp. 80, 82 (D. Del. 1933); *General Talking Pictures Corp.* v. *American Tel. & Tel. Co.*, 18 F. Supp. 650, 655-657 (D. Del. 1937).

In this sophisticated antitrust age, the Telephone Company's "tariff" would certainly not fly an express red-streamer "condition that a station licensee must not purchase from or deal with any other supplier," whose absence is stressed by the Commission (Mot., p. 16). "For purposes of the Clayton Act, the requisite condition not to deal in the goods of another may be inferred from the practical effects of the tying arrangement," which "may achieve a result equivalent to total exclusion of other sellers without the formality of expressly saying so." *Times-Picayune Pub. Co.* v. *United States*, 345 U.S. 594, 607 n. 23, 615 n. 35 (1953).

The California Commission's doubt that the FCC would refuse to grant radio licenses to lessees of private radio systems from Pacific (Mot., p. 17), is apparently not shared by the latter, which advised the California Commission one day later to the contrary. Application for Tariff Cancellation, p. 9.

action against subsequent antitrust attack by the Department of Justice, was not intended to bestow immunities on any monopolistic practices prohibited by the Communications Act; nor was it intended to relieve the FCC from its specific statutory obligation to enforce the pertinent provisions of the Clayton Act against "common carriers" such as the Telephone Company. Section 602(d) of the Communications Act; see 15 U.S.C. § 21.

(3) Finally, the rationale of this Court's *Benanti* decision, 355 U.S. 96 (1957), which prohibited states from vitiating the Communications Act's policy against wire-tapping, is highly in point. The federal policy against monopolistic practices in radio, expressed by Title III of the Communications Act, surely commands no lesser respect by state agencies than the federal policy in Section 605 against clandestine interception of messages.

*Substantial Constitutional Problems Result from State Utility Regulation Threatening to Destroy Independent Competitors.*

Appellees' assurances that the invasion of the private mobile radio field by the telephone monopoly is a virtual blessing for competition (P.U.C. Mot., pp. 20-23; Tel. Co. Mot., p. 21) are at war with the facts and the "realities of the situation" which reveal a serious Constitutional question.

Entry of the Telephone Company into areas served by private enterprise is a requiem for independent competitors. Economic attrition of rivals may be fostered not only by exclusionary tactics, but also by destructively low rate levels subsidized by the

guaranteed return from the telephone monopoly operation for which the general public subscriber must pay.[5] The rapid recorded rise in private systems leased by the Telephone Company—from 8 to 214, including 1702 mobile units, between 1953 and 1956 in California alone (Tel. Co. Mot., App. p. 6)—belies the effort to play down the Telephone Company's potential for engulfing the private mobile radio field. (P.U.C. Mot., p. 4; Tel. Co. Mot., p. 7).

Understandably, the Department of Justice admonished the Federal Communications Commission two years ago that any approval of a similar Telephone Company tariff "might substantially lessen the competition which now exists in the leasing, as well as the manufacture and sale, of equipment for use in private communication systems," and "would tend to strangle the growth of the radio equipment industry."[6] Nor may the appellees obscure such "realities of the situation," accurately perceived by the minority opinion below (Juris. St., p. A19), by consistently labeling the opinions of the PUC as "factual findings" which are somehow impervious to judicial review.

The rationale of the PUC corroborates the need for plenary review of the Constitutional issue. According to the Commission, "A regulated monopoly is perfectly consistent with the public interest," for "as a general proposition, public regulation removes the curse of illegality from such a monopoly." (Mot.

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[5] In this very case, the California PUC staff found that Pacific's challenged private mobile radio operations were conducted at *a loss of 3%*, but was overruled by the Commission which deemed the Telephone Company's contentions "more convincing." 55 Cal. P. U. C. 387, 404; reprinted at Tel. Co. Mot., App. p. 30. The Commission was "reluctant to require a utility to charge a higher rate than in its judgment is necessary." *Ibid.*

[6] F. C. C. Dkt. No. 11972, March 27, 1957 and September 6, 1957.

p. 21). But the Constitutional philosophy of a free society can tolerate the proliferation of even regulated monopolies only after *some* minimal demonstration of public necessity. As the three minority Justices pointed out, such a showing not only is glaringly absent here, but is affirmatively contradicted by the Commission's own opinion.[7]

Above all, a cardinal issue of contemporary concern is the extent to which the blanket of agency regulation may cover a monopoly-minded corporation so as to deflect antitrust policies and to smother competition, in direct conflict with the Constitutional considerations behind valid public utility controls. Compare *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481 (1958); *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83 (1957).[8]

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[7] It is not supplied by the majority's observation, stressed by the Telephone Company (Mot., p. 18), that private mobile radio equipment is used by police and fire departments and other public service bodies. This logic would view the sale of pencils or gasoline, equally used by these agencies, as a "public utility" service in California if purveyed by the Telephone Company.

[8] The Telephone Company cannot deny that it courted the state Commission's regulation by a voluntary "tariff" filed on the heels of the federal antitrust decree. The veiled suggestion that Pacific actually resisted public utility status for the private radio business (Mot., pp. 22-23) is misleading. The 1954 and 1955 proceedings before the California Commission, see 53 Cal. P. U. C. 662; 54 Cal. P. U. C. 75; compare 55 Cal. P. U. C. 387, 395-396, held that the Telephone Company must not finance destructively low prices for radio equipment leasing from its telephone revenues to the burden of the public subscriber. The Telephone Company naturally opposed this charge and the associated requirement that it file such private equipment contracts for the Commission's surveillance over the disposition of its assets. But appellees cannot urge that these "assertions of jurisdiction by the Commission" and its inchoate "earlier view" are the equivalent of the public utility status and regulation sought and given after entry of the consent decree.

*The Issues are Properly Presented to this Court by Appellants.*

The Telephone Company's denial of this Court's power to consider this case on appeal under 28 U.S.C. § 1257(2), rather than via certiorari under 28 U.S.C. § 1257(3), rests on an empty technicality which is superseded by the practical logic of more recent decisions.

The California Supreme Court sustained against federal challenge the Public Utilities Commission's ruling as a lawful exercise of its powers legislatively delegated by the Public Utilities Code. Hence, the validity of California's enabling constitutional and code provisions was drawn into question,[9] and the Telephone Company's characterization of the Commission's determination as "judicial" rather than "legislative" is beside the point. Cf. *McCollum* v. *Board of Education*, 333 U.S. 203, 206 (1948); *Atchison, T. & S. F. Ry. Co.* v. *Public Utilities Commission of California*, 346 U.S. 346, 348 (1953).[10]

If the labels of "legislative" versus "judicial" *were* meaningful and material for this purpose, the informal investigative hearing conducted before the Commission was surely as "legislative" and non-"judicial" as a proceeding can get. The Commission not only did not purport to operate within the procedural limitations of a judicial proceeding, but even denied requests for

[9] The several interlacing California provisions are detailed in the California Supreme Court's opinions, reprinted in appellants' Jurisdictional Statement at pp. A5-A6 and again at A16.

[10] The two per curiam orders cited by the Telephone Company (Mot., p. 14) are bare of any discussion supporting the assertion, and the state court ruling cited (Mot., p. 15) concerned the application of *res judicata* to California administrative practice.

a formal report by the presiding officer (55 Cal. P.U.C. 387, 388; reprinted at Tel. Co. Mot., App. p. 3).[11]

And even if the Telephone Company's contentions had substance, 28 U.S.C. § 2103 provides for certiorari consideration of the substantial federal issues tendered by the appellants. *E.g., Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 290 (1958).

Similarly far-fetched is the Telephone Company's suggestion that appellants lack a sufficient legal "interest" to invoke this Court's powers of review. It is plain from the issues and the opinion of the three minority Justices that the majority decision of the California Supreme Court unleashed the Telephone Company to invade the private mobile radio business and jeopardize appellants' economic survival. (See minority opinion, Juris. St., p. A19). Whether the Commission's order undertakes to "regulate" these appellants at this time is irrelevant. It is the controversy over the *unlawful* competition on the part of the Telephone Company, barred by the federal antitrust decree and Communications Act, which provides the basis for resort to this tribunal's appellate juris-

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[11] Actually, the elusive nature of these labels is confirmed by the ruling of the Federal Communications Commission, at the instance of the Telephone Company, that even such "jurisdictional" issues in the FCC's parallel investigation into the Telephone Company's "tariff" for private mobile radio systems were legislative-type "rule-making" rather than "adjudication"—thereby avoiding an intermediate decision by a Hearing Examiner. *American Telephone & Telegraph Co.*, 22 F. C. C. 1220, 1225 (1957).

Totally without merit is the Telephone Company's intimation (Mot., p. 9 n. 1) that the antitrust decree issue was not individually raised below, for the court below "actually considered and decided" the consent decree question. *Charleston Federal Savings & Loan Ass'n* v. *Alderson*, 324 U.S. 182, 185-186 (1945); *McCollum* v. *Board of Education*, 333 U.S. 203, 207 (1948). Compare the Telephone Company's Answer to Petitions for Review by the court below, pp. 41 *et seq.*

diction by these commercially aggrieved independent rivals. *E.g., Chicago* v. *Atchison, T. & S. F. Ry. Co.*, 357 U.S. 77, 83 (1958); *Frost* v. *Corporation Commission*, 278 U.S. 515, 521 (1929).

## CONCLUSION

The appellees have failed to dispel the substantial federal questions arising from the decision below which warrant plenary resolution by this Court. Appellants respectfully urge, therefore, that the Court permit this case to be heard on the merits.

If any question as to "mootness" should develop from the unilateral request for tariff cancellation filed on March 17, 1959 by the appellee Pacific Telephone and Telegraph Company before the appellee Public Utilities Commission, appellants respectfully request an opportunity to address themselves by appropriate pleadings to this Court's prerogative to pass on the judgment below which contravenes a continuing antitrust injunction.

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